Supreme Court, U. S.
FILED
OCT 19 1978

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-540

THE NEW YORK TIMES COMPANY and
MYRON FARBER,
Petitioners,

v.

THE STATE OF NEW JERSEY and
MARIO E. JASCALEVICH,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

RESPONDENT'S STATEMENT IN SUPPORT OF PETITION

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Respondent,
State House Annex,
Trenton, New Jersey 08625

JOHN J. DEGNAN,
Of Counsel and
on the Memorandum.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623 8611

TABLE OF CONTENTS

PAGE

STATEMENT OF RESPONDENT 1-7

Cases Cited

Branzburg v. Hayes, 408 U.S. 665 (1972) 3, 6

Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429 (Sup.Ct.) cert. den. 419 U.S. 966 (197 6

Carey v. Hume, 492 F.2d 631 (D.C. Cir.) cert. dismissed 470 U.S. 938 (1974) 6

Farr v. Pitchess, 522 F.2d 464 (9 Cir. 1975), cert. den. 427 U.S. 912 (1976) 6

Rosato v. Superior Court of Fresno Cty., 51 Cal. App. 3d 212, 124 Cal. Rptr. 427 (Ct. App. 1975), cert. den. 427 U.S. 912 (1976) 6

State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (Sup. Ct. 1974) 6

United States v. Liddy, 354 F.Supp. 228 (D.D.C. 1972) 6

Zelenka v. Wisconsin, —— Wis. ——, 266 N.W.2d (Sup.Ct. 1978) 6

United States Constitution Cited

First Amendment 2, 3, 6

Sixth Amendment 2, 6, 7

PAGE

Statutes Cited

N.J.S.A. 2A:84A-21 2

N.J.S.A. 2A:84A-21a 2

Rule Cited

R. 1:10-4 2

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-540

THE NEW YORK TIMES COMPANY and
MYRON FARBER,

Petitioners,

v.

THE STATE OF NEW JERSEY and
MARIO E. JASCALEVICH,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

STATEMENT OF RESPONDENT

This memorandum is in response to the Petition for Writ of Certiorari filed on behalf of petitioners, the New York Times Company and Myron Farber. Petitioners seek a Writ of Certiorari to the Supreme Court of New Jersey seeking review of a judgment and opinion, —— N.J. —— (September 1, 1978), which sustained judgments of criminal contempt and civil contempt (in aid of litigant's rights) imposed upon petitioners for failure to comply

with subpoenas *duces tecum* and enforcement orders issued during the course of an ongoing murder trial.

Respondent, Attorney General of New Jersey, was directed to prosecute the criminal contempt proceedings in the Superior Court of New Jersey, Law Division. See R. 1:10-4. Subsequently, the appeals from the judgments in aid of litigant's rights and criminal contempt were consolidated by the Superior Court, Appellate Division, and certified directly to the New Jersey Supreme Court without argument or decision in the Appellate Division. The contempts resulted from petitioners' refusal to comply with the trial court's order to deliver the subpoenaed material to the Court for *in camera* inspection prior to the Court's determination as to certain claims of petitioners directed to the propriety, legality and scope of the subpoenas *duces tecum*. Petitioners asserted that the First Amendment and New Jersey News Media Privilege, N.J.S.A. 2A:84A-21 and 21a, protected the subpoenaed material from disclosure.

In both the Appellate Division and the Supreme Court of New Jersey, the Attorney General argued that the matter should be remanded because petitioners had not been afforded a hearing below to require defendant Jascalevich to demonstrate a threshold showing of relevance, materiality and need, to consider the scope of an apparently all-inclusive subpoena and to consider the possibility of other nonprivileged or less intrusive means of securing the materials sought. We also urged there that requiring the *in camera* production of all materials sought prior to a determination of the good faith nature of the requests represented a serious potential abuse of the Sixth Amendment compulsory process clause. Although these arguments were grounded primarily on the need to balance the State's News Media privilege against defendant's Sixth Amendment rights, it is even more strongly applicable in the context of a privilege cloaked with First Amendment protections.

The majority of the New Jersey Supreme Court rejected all of petitioners' claims, including those asserted under the First Amendment, and held that while a "balancing test" was required in future cases involving the State statutory privilege, the First Amendment afforded petitioners no protection. The Court determined that newspapermen had no First Amendment right to a hearing to determine whether and to what extent the subpoenaed material was protected by the First Amendment. The majority specifically rejected the fact that a "balancing test" was required by virtue of Mr. Justice Powell's vote and concurring opinion in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

The Attorney General of New Jersey supports the petitioners' application for a Writ of Certiorari in this case. Clarification of the *Branzburg* holding would be appropriate in light of the conflict among lower state and federal courts with respect to whether a "balancing test" is required by the First Amendment upon an application to quash or limit a subpoena *duces tecum* addressed to a member of the news media prior to the return of such subpoena. Given the ongoing underlying murder prosecution and the nature of "in aid" proceedings, the First Amendment issue should be expeditiously resolved with finality.

In the course of his opinion for the majority of the New Jersey Supreme Court, Mr. Justice Mountain stated:

> The point to be made, however, is that among the many First Amendment protections that may be invoked by the press, there is not to be found the privilege of refusing to reveal relevant confidential information and its sources to a grand jury which

is engaged in the fundamental governmental function of '[f]air and effective law enforcement aimed at providing security for the person and property of the individual . . .' [408 U.S. at 690, 33 L.Ed.2d 644] The reason this is so is that a majority of the members of the United States Supreme Court have so determined.

Faced with this conclusion, appellants appear to argue that Justice Powell's concurring opinion in *Branzburg* somehow fails to support this result. The argument is without merit. We do not read Justice Powell's opinion as in any way disagreeing with what is said by Justice White. But even if it did, it would not matter for present purposes. The important and conclusive point is that members of the court have all reached the conclusion that the First Amendment affords no privilege to a newsman to refuse to appear before a grand jury and testify as to relevant information he possesses, even though in so doing he may divulge confidential sources. The particular path that any justice may have followed becomes unimportant when once it is seen that a majority have reached the same determination.

Thus, we do no weighing or balancing of societal interests in reaching our determination that the First Amendment does not afford appellants the privilege they claim. The weighing and balancing has been done by a higher court. Our conclusion that appellants cannot derive the protection they seek from the First Amendment rests upon the fact that the ruling in *Branzburg* is binding upon us and we interpret it as applicable to, and clearly including, the particular issue framed here. It follows that the

obligation to appear at a criminal trial on behalf of a defendant who is enforcing his Sixth Amendment rights is at least as compelling as the duty to appear before a grand jury. (Slip opinion at 10-12; petitioners' appendix at 8a-10a)

In his separate dissent, Mr. Justice Handler stated:

> It is, I believe, in necessary recognition of the First Amendment concern for the unfettered functioning of the news media in a free and democratic society that many courts have espoused the 'balancing' approach articulated by Justice Powell . . . These decisions take *Branzburg* perhaps further than justified by a flat reading of either its majority or concurring opinion. They nevertheless show, as does *Branzburg,* that the reporter's conduct in obtaining and recounting news is a matter of constitutional consideration. A newsman's interest in the gathering of news is an indispensable component in its dissemination and a vital incident to freedom of the press. . . . That interest is therefore entitled to protection. In this perspective the reporter stands apart from the ordinary citizen and although he is not thereby shed of the burdens of citizenship and must respond as any citizen to legal process, he should not needlessly be hobbled in the pursuit and presentation of news. Constraints upon the news media should therefore be tolerated only when they are essential in the good faith discharge of legitimate governmental objectives, or when clearly required for the vindication of individual constitutional rights. We are here confronted with such a case and it is in this framework that the fundamental, contending claims of the principals should be assessed. (Slip opinion

at 8-10; petitioners' appendix at 46a-47a). (citations omitted)*

The differences in approach evidenced by the four opinions of the New Jersey Supreme Court underscore the existing conflict in interpretation of *Branzburg*. There is, indeed, a difference of view as to whether *Branzburg* requires a "balancing test," particularly in light of the fact that the fifth vote in *Branzburg* was cast by Mr. Justice Powell. See and compare *Farr* v. *Pitchess*, 522 F.2d 464 (9 Cir. 1975), *cert.* den. 427 U.S. 912 (1976); *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir.) *cert.* dismissed 470 U.S. 938 (1974); *United States* v. *Liddy*, 354 F.Supp. 228 (D.D.C. 1972); *Zelenka* v. *Wisconsin*, —— Wis. ——, 266 N.W.2d (Sup.Ct. 1978); *Brown* v. *Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (Sup.Ct.) *cert.* den. 419 U.S. 966 (1974); *State* v. *St. Peter*, 132 Vt. 266, 315 A.2d 254 (Sup. Ct. 1974); *Rosato* v. *Superior Court of Fresno Cty.*, 51 Cal. App. 3d 212, 124 Cal. Rptr. 427 (Ct. App. 1975), *cert.* den. 427 U.S. 912 (1976).

The Attorney General of New Jersey submits that, in light of the conflict among lower courts concerning the impact of Mr. Justice Powell's concurrence in *Branzburg*, *certiorari* should be granted to determine whether First Amendment rights must be balanced against Sixth Amend-

* Mr. Justice Handler concluded that the protection embodied in the New Jersey News Media Privilege, enacted in response to *Branzburg*, was not absolute and had to bend to valid Sixth Amendment claims. He, however, concluded that the record in this case did not justify a finding that the privilege was not applicable. Mr. Justice Pashman also dissented asserting the denial of due process based upon the failure to afford petitioners a hearing prior to requiring the disclosure *in camera*. The Chief Justice concurred in the majority opinion and also filed a separate concurring opinion.

ment claims with respect to materials subpoenaed from members of the news media and, if so, the constitutional nature of the "balancing test" to be applied.

Respectfully submitted,

JOHN J. DEGNAN
Attorney General of New Jersey